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**IN THE
Supreme Court of the United States**

October Term, 1937

No. 166

THE TOLEDO PRESSED STEEL COMPANY,
Petitioner,

v.

STANDARD PARTS, INC.,
Respondent.

No. 167

THE TOLEDO PRESSED STEEL COMPANY,
Petitioner,

v.

HUEBNER SUPPLY COMPANY,
Respondent.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF; AND MOTION TO DEFER
CONSIDERATION OF PETITION**

WILBER OWEN,
Attorney for Petitioner

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*Attorney for Petitioner.***

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PETITION

**To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:
The Toledo Pressed Steel Company respectfully**

prays that writs of certiorari issue to review the decrees of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above entitled cases on December 7th, 1937 (R. 284), reversing decrees of the District Court of the United States for the Northern District of Ohio, Western Division (R. 283, 284). A certified transcript of the record in these cases, with the necessary additional copies thereof, has been filed in compliance with Rule 38 of the rules of this court.

Summary and Short Statement

The petitioner and both respondents are corporations organized under the laws of Ohio. In January, 1934, the petitioner filed bills of complaint against the respondents in the United States District Court for the Northern District of Ohio, Western Division, charging infringement of United States Letters Patent No. 1,732,708, issued to the petitioner on October 22, 1929, for Burner, on an application filed by its president and vice-president, Joseph E. Withrow and Lyman W. Close (R. 156). The cases were heard together before the late Judge Hahn, who filed a single opinion (R. 21) and entered decrees finding the patent valid and infringed (R. 30, 32). Respondents appealed to the Sixth Circuit Court of Appeals. A single record was made up and the cases were heard together by that court, which entered decrees reversing the decrees of the District Court and ordering the bills of complaint dismissed for want of invention. The petitioner filed a petition for rehearing (R. 287) which was denied on March 16, 1938 (R. 303).

The patent is for a burner for a construction torch. Figure 3 of the patent with claims 2 and 11 applied thereto is shown on page 160 of the record and respondent's devices with the same claims applied are shown on pages 161 and 162 of the record.

The principal use of devices made under the patent is to warn the traveling public at night of the presence of excavations or obstructions on the public highways.

Torches made by the petitioner embodying the invention of the patent in suit and others embodying the claimed combinations of elements are the only warning signals which are able to withstand the tests prescribed by various state highway departments for use in connection with trucks and buses parked at night on the public highways.*

The torches manufactured by the petitioner and the accused devices pass all of these state tests and are sold extensively for such purpose. (See circulars of respondent's flares at pages 197, 198 and 222 of the record.)

The old type open-flame torches, in use by contractors and others since time out of mind, do not pass these state requirements and hence are not available for use as warning signals for parked trucks and buses, and red

*A typical state law is that of Iowa, which provides (R. 80):

"Section 1. Motor trucks and combinations thereof operating on the highways during the period from one-half ($\frac{1}{2}$) hour after sunset to one-half ($\frac{1}{2}$) hour before sunrise shall at all times be equipped with portable flares which may be plainly visible for a distance of five hundred (500) feet. The operator of a motor truck or combination shall, immediately upon bringing his vehicle to a stop upon or immediately adjacent to the traveled portion of the highway at any time during the period from one-half ($\frac{1}{2}$) hour after sunset to one-half ($\frac{1}{2}$) hour before sunrise, place a flare at the side of such vehicle and in plain view of all traffic, and shall maintain it in such position during the time such vehicle remains parked."

Under this law the Public Utilities Commission of Iowa adopted the following regulations for drivers of trucks and buses (R. 80):

"Place lighted pot torches 100 full steps ahead and behind the vehicle at least one full step out in the road, and a lighted pot torch along the side of the vehicle which others pass. * * *

Under this authority the Iowa State Highway Commission prescribed tests as follows (R. 210-211):

(a) The torch must remain lighted at least thirty seconds in a forty-mile per hour wind and burn continuously in a twenty-six-mile per hour wind.

(b) The torch must burn at least five minutes in a twenty-six-mile per hour wind with rain applied at the rate of 2.48 inches per hour.

(c) The carbon deposit must be light and the flare pass the two preceding tests after two hours' operation in a quiet atmosphere.

(d) The torch must remain lighted for at least eight hours.

lanterns are not acceptable as warning signals on the public highways because they cannot be distinguished from the tail-lights of automobiles (R. 69, 78).

The invention of the patent, because it provides an effective and reliable warning signal, has been and is of great benefit to the public.

The patented torch was developed as a result of numerous complaints received by petitioner from users of the old type open-flame torch which it had been manufacturing for a number of years (R. 52-56). Petitioner's patented torch was placed on the market in January, 1929, and promptly superseded the old type open-flame torch for such uses as were then open to it (R. 69).

Petitioner's principal competitors in the manufacture and sale of the old type open-flame torch prior to the introduction of the patented torch—McCloskey Torch Company, of Toledo, Ohio, and R. E. Dietz Company, of New York—commenced the manufacture and sale of torches embodying the patented combinations shortly after the patented torch was placed on the market by the petitioner.*

Prior to the decrees entered by the District Court three manufacturers had taken licenses under the patent in suit, and subsequently three other manufacturers, including said R. E. Dietz Company, took licenses.

The irregular, unsteady flame of the old open torch was ideal as a warning signal, but it was unreliable. It would go out in heavy rains and high winds. The problem which confronted the patentees was how to preserve this desirable character and quality of flame in stormy weather without obscuring it from view by placing a guard around it. To guard the flame itself from wind and rain naturally would destroy its utility as a warning signal. The problem was how to preserve the visibility

*This fact is referred to in Judge Hahn's opinion (R. 22).

of this flame and at the same time provide means to insure its maintenance in stormy weather, when most needed as a warning signal.

To accomplish this the patentees conducted a long series of experiments, constructing and testing many burners under actual outdoor conditions.* Necessarily they must work in a restricted field. The fuel must be cheap, safe to handle and available everywhere, this meant kerosene. The torch must be of sturdy construction because subjected to rough handling and usage, which eliminated glass protectors. The device must be of simple and cheap construction, which meant that the kerosene must be fed to the burner by a wick and not by air pressure, requiring a pump. The burner which they finally produced and patented operates as follows:

The exposed end of the wick is surrounded by an apertured cap which performs the double function of protecting the source of the flame from wind and rain and of heating the oil in the wick above the flash point so as to produce an ample supply of hydrocarbon vapor to burn partially within the cap, but mainly outside the cap where it provides an open unguarded flame under all weather conditions.

This operation is described at lines 68 to 89 of page 1 of the patent and is confirmed by the advertisements of respondents and others (R. 157).

The Court of Appeals treated the invention as being for nothing more than a flame guard. It said, "The invention is for a burner with a metal guard to protect the flame from air currents and rain" (R. 285, near bottom), and observed that the art disclosed a number of metal guards for burners.

Not one of the patents referred to by the Court of Appeals as illustrative of "metal guards for burners"

*Some of the experimental burners are illustrated in Exhibits 7 and 10-A to 10-J (R. 168-180).

was intended for the same use as is the burner of petitioner's patent, and the proofs do not show that any of them is capable of performing the function of converting kerosene into hydrocarbon vapor in a protected chamber and burning it partially within the chamber but mainly outside the chamber where it will continue to burn and provide a warning signal in stormy weather.

The advertising literature of one of the respondents contains the following statement, which is amply supported by the proofs (R. 197):

"The specially constructed burner will continue to burn in a forty-mile gale and is not affected by rain or storm. The heat generated in this burner converts the fuel to a gas and only the gas burns. This adds a long life to the wick."

The circular of the other respondent contains the following (R. 222):

**"GENUINE BOLSTER FLARES*—FOR
SAFETY"**

This Safety Feature PREVENTS Accidents

"Liability insurance can rebuild a crashed car—pay a hospital bill—compensate for lost time, but it can't return the dead to life, or repair shocked and shattered nerves.

"Protect yourself against the grief and pain of hurting others. Do your part to prevent the thousands of motor car accidents that occur every year because of stalled trucks, buses and cars being struck by speeding cars. Hundreds of thousands of others are barely avoided. Thousands of lives are lost—more thousands of people injured—millions of dollars worth of property damaged.

"Your own good judgment says 'Use Flares.' Comparison and common sense say Use the Best Flares—the Genuine Bolser Flares—road tested and time tried.

"Bolser Flares are your safety insurance. They are always ready for use—quickly set out or picked up—and more efficient than the law requires."

*"Flare" is the commercial name for torches used as warning signals for parked trucks and buses.

In advertising a burner which the petitioner then claimed to infringe and which since has been licensed, R. E. Dietz Company said (R. 203):

"* * * A flare burner, despite its apparently simple construction, is really a kerosene carburetor, and must be made right to control and feed the kerosene gases and oxygen to the flame, also to protect the flame from the elements."

The trial court which heard the testimony appreciated the fact that the invention was not of a flame-guard. Judge Hahn said a study of the patent "shows that the essence of the invention here is protection of the flame at the source, * * *." (R. 28.)

The patented torch resulted in a saving of more than 50% in kerosene consumption and of practically 100% in wick consumption as compared with the old type open-flame torch, and respondents' Bolser and K-K flares show substantially the same economies (R. 185-189).

Notwithstanding the above undisputed facts and because there was "no substantial evidence of effort general to the industry" to solve the problem prior to its solution by petitioner's patentees, the Court of Appeals substituted its intuition or divination of what was easy and apparent for the actual experience of those skilled in the art and held the patent invalid for want of invention.

Question Presented

The sole question is—

Whether a patentee who "has added a new and valuable article to the world's utilities,"* in order to sustain his patent against the defense of lack of invention, must prove affirmatively an "effort general to the industry to

**Diamond v. Consolidated Tire Co.*, 220 U. S. 428, 435.

solve a problem which long defied it"" in addition to proving that the patented device (a) promptly superseded older devices in use for similar purposes for many years, (b) is acceptable and largely used in fields not available to the older devices, (c) has resulted in a saving of more than 50% in the cost of operation over the older devices, and (d) that the patent has been recognized by a number of other manufacturers who have taken out licenses thereunder.

Reasons Relied on for Granting the Writ

1. Because the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this court.

2. Because the decision of the Circuit Court of Appeals tends to establish a different rule as to lack of invention in combination claims from that established by this court.

Wherefore, your petitioner prays that writs of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record of all the proceedings of the Circuit Court of Appeals had in these cases, to the end that these cases be reviewed and determined by this court; that the judgments of the Circuit Court of Appeals reversing the decrees of the District Court be reversed, and that the petitioner be granted such other and further relief as may seem proper.

THE TOLEDO PRESSED STEEL COMPANY,

Petitioner,

WILBER OWEN,

Attorney for Petitioner.

""The Court of Appeals opinion states (R. 285, 286): "" * * There is here no substantial evidence of effort general to the industry to solve a problem which long defied it. * * ""

BRIEF IN SUPPORT OF THE PETITION**Opinions Below**

The opinion (not reported) of the District Court of the United States for the Northern District of Ohio, Western Division, appears at pages 21 to 29 of the record, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 284) is reported in 93 Fed. (2d) 336.

Jurisdiction

The decree of the Circuit Court of Appeals was entered on December 7, 1937 (R. 284). A petition for rehearing (R. 287) was denied March 16, 1938 (R. 303). The time for filing the petition for certiorari herein was extended to July 1, 1938, by an order of Mr. Justice McReynolds entered June 14, 1938 (R. 304). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C. Title 28, Section 347(a).

Statement of the Case

The principal facts pertinent to the single question involved are sufficiently stated in the petition, *ante*, pages 2 to 7.

Specification of Errors

1. The Circuit Court of Appeals for the Sixth Circuit erred in reversing and in not affirming the decrees of the District Court finding the patent in suit valid and infringed.

2. The said court erred in substituting its own intuition or divination of what was easy and apparent for the actual experience of those skilled in the art at and prior to the date of invention.

3. The said court erred in disregarding the presumption of validity arising from the granting of the patent and in placing on the petitioner the burden of affirmatively establishing validity instead of requiring respondents to establish invalidity.

4. The said court erred in holding that any mechanic skilled in the art could have produced the burner of the patent in suit by combining the open-flame torch of the prior art and a flame guard taken from the indoor burner art, such, for example, as a guard for a pilot light on a kitchen gas stove.

ARGUMENT

The Importance of the Question Involved

The Court of Appeals, in holding the patent in suit invalid for want of invention, disregarded the long established rule of this court, restated in *Radio Corporation of America vs. Radio Engineering Laboratories, Inc.*, 293 U. S. 1, 2 and 7, "that **one otherwise an infringer** who assails the validity of a patent fair upon its face **bears a heavy burden of persuasion**, and fails unless his evidence has more than a dubious preponderance. * * *"
(Emphasis ours.)

Instead of placing the burden on the respondents to establish invalidity of the patent, the Circuit Court of Appeals placed the heavy burden on the petitioner of proving that others had attempted to solve the problem and failed.

The Court of Appeals in holding the invention to be "for a burner with a metal guard to protect the flame from air currents and rain," failed to recognize the real invention, which was the provision of a vapor generating means inside a protected chamber where it is unaffected by weather conditions, the vapor burning partially inside.

the protected chamber to maintain the kerosene above the flash point, but mainly outside that chamber where it burns as an unprotected warning signal under all kinds of weather conditions. The District Court which heard the testimony appreciated the fact that the invention was **not of a flame guard**. It said, a study of the patent shows that the "essence of the invention here is protection of the flame at the source * * *." (R. 28.)

That any mechanic skilled in the art having a knowledge of the patent in suit or of devices made under it might now be able to produce the patented device by adapting flame guards of earlier patents intended for use in other surroundings and combining them with the old type open-flame torch, does not militate against the right of patent protection to those who were the first to discover and disclose the possibility of so doing. *Clough vs. Barker*, 106 U. S. 166, 176; *Eibel Process Co. vs. Minnesota & Ontario Paper Co.*, 261 U. S. 45.

The oft-quoted statement by Mr. Justice Blatchford in *Clough vs. Barker* applies to the facts of the present case without qualification. No structure of the prior art was designed for the same purpose as Withrow and Close's, no person looking at the prior art structures or using them would understand that they were to be used in the way Withrow and Close's is used, and none of them is shown to have been really used and operated in that way.

In the *Eibel Process* case, the patentee after studying the problem concluded that the trouble could be obviated by increasing the speed of the flowing stock to approximately the speed of the wire, and to accomplish this "he proposed to add to the former speed of the stock by substantially tilting up the wire and giving the stock the added force of downhill flow." This he confirmed by actual trial.

The inventions in the *Clough* and *Eibel Process* cases lay in the conception that the problem confronting the inventor could be solved by a slight change of location of one part of a structure of the prior art. The *Clough* patent was for a gas burner which provided a supplementary supply of gas. The prior art contained the Horace R. Barker burner which, without change of structure, but by an adjustment of parts not intended, could be used to provide an additional supply of gas to the flame. In holding the *Clough* patent valid, the court said (p. 175):

"The testimony as to any additional or supplementary supply of gas in the Horace R. Barker burner amounts really to this only,—that if that burner is used now in a way in which it was never designed to be used, and is not shown to have ever been used before *Clough's* invention, it may be made to furnish a supplementary supply of gas."

In the *Eibel Process* case the change which was held to involve invention consisted in tilting up the frame carrying the wire which supported the paper stock so that the flow of the stock would be increased by gravity and thereby "maintain equality of speed between stock and wire at the crucial point, * * *."

Even if the Court of Appeals were correct in its assumption (of which there was no proof) that any skilled mechanic could have combined a flame guard of the prior art with the old open-flame McCloskey torch and thus produce a device which would operate in accordance with the disclosure of the patent in suit, it erred in assuming that any mechanic skilled in the art should have conceived the possibility of overcoming the objection to the open-flame torch by thus combining structures which never before had been combined.

It is not denied that the patentees, as a result of their long series of experiments, "added a new and val-

uable article to the world's utilities." That one who has accomplished such a result is entitled to protection as an inventor, even though he proceeded by the "cut and try" method, is settled law.

In *Diamond Rubber Company vs. Consolidated Tire Co.*, 220 U. S. 428, 435, this court said:

" * * * A patentee may be badly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor."

In the *Eibel Process* case, this court said, "The first and most important question is whether this was a real discovery of merit." (261 U. S. 45, 52.)

That the patentees made a "real discovery of merit" when they learned as a result of their experiments that the old open-flame wick burner could be converted into a kerosene carburetor by placing a metal guard around the source of the flame, but not around the flame itself, cannot be doubted in view of the following:

1. The highly desirable quality and character of the flame of the old type open-flame torch, as a warning signal, has been preserved.

2. The source of the flame has been so protected that the flame will continue to burn and operate as a warning signal under weather conditions which extinguished the flame of the old type torch (R. 188).

3. Fuel consumption has been reduced more than one-half (R. 185-188).

4. Wick consumption, which was very high in the old type torch, has been practically eliminated (R. 189).*

*Due to the fact that the wick of the old type torch was exposed 1½" or more, the flame burned from the wick and the wick was consumed. In the patented burner only ½" of wick is exposed and instead of the flame burning from the wick, hydrocarbon vapors are produced which burn away from the wick and principally outside the guard.

Confusion and Uncertainty in Decisions of Lower Courts as to What Constitutes Invention

Because in a number of cases before this court in recent years the patents have been held invalid for lack of invention, there is a growing tendency on the part of lower courts to invalidate patents for meritorious advances.

This court always has recognized that the simplicity of an invention and its apparent obviousness after the event are misleading and unreliable bases on which to determine the question of invention.

In *Loom Company vs. Higgins*, 105 U. S. 580, 591, the court said:

“... This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain from the evidence and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. * * * Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.” (Emphasis ours.)

In *Potts vs. Creager*, 155 U. S. 597, 608, the court pointed out that it is immaterial that “after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the de-

cisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practiced eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one."

In *Expanded Metal Co. vs. Bradford*, 214 U. S. 366, 381, the court said:

"* * * The fact that the invention seems simple after it is made does not determine the question; if this were the rule many of the most beneficial patents would be stricken down."

See also

Krementz vs. Cottle Co., 148 U. S. 556;

DuBois vs. Kirk, 158 U. S. 58;

Hobbs vs. Beach, 180 U. S. 383;

Carnegie Steel Co. vs. Cambria Iron Co.,
185 U. S. 403.

No recent decision of this court disturbs this long established rule, yet the present tendency of the lower courts is to substitute their own ideas of what should have been obvious to those skilled in the art for the actual facts of record, which in the present case all point to the presence of invention.

In *Richmond vs. U. S.*, 275 U. S. 331, the court sustained a patent for what might have appeared to be an obvious advance, because it cut down costs, had not occurred to any one before, and superseded older structures, all of which facts are present here. There was no evidence that others had tried and failed.

The evidence shows great commercial success. The patented device promptly superseded other devices which had been in common use for many years. The merits of the advance were recognized by three other prominent manufacturers who took licenses prior to the time when the District Court held the patent valid and infringed.

This court has frequently held that "where the question of novelty is in doubt, the fact that the device has gone into general use, and displaced other devices employed for a similar purpose, is sufficient to turn the scale in favor of the invention." *Fetts vs. Creager*, 155 U. S. 597, 609; *Smith vs. Goodyear*, 93 U. S. 486, 495.

In *Diamond Rubber Co. vs. Consolidated Tire Co.*, 220 U. S. 428, Mr. Justice McKenna stated (page 435):

"But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as a demonstration."

CONCLUSION

We submit that the granting of writs of certiorari in these causes would be appropriate because the question involved is one upon which considerable diversity of opinion exists. A rule of law applicable to a large number of cases involving the question of invention would be clarified by a decision of this court in these causes.

Wherefore, it is respectfully prayed that writs of certiorari be issued.

WILBER OWEN,

Attorney for Petitioner.

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**MOTION TO DEFER CONSIDERATION OF
PETITION**

Now comes the Petitioner, The Toledo Pressed Steel Company, and moves that consideration of the foregoing petition for certiorari in these causes be deferred pending the decision of the United States Circuit Court of Appeals for the Second Circuit in the cause entitled *The Toledo Pressed Steel Company, Plaintiff-Appellant, vs. Montgomery Ward & Co., Inc., Defendant-Appellee*, Docket No. 16071, and, in support thereof, shows:

1. There is now pending before the United States Circuit Court of Appeals for the Second Circuit, an appeal from the District Court of the United States for the Eastern District of New York, in which the petitioner her@is appellant and Montgomery Ward & Co., Inc., is appellee. Said appeal was docketed on or about June 2, 1938, a certified copy of the transcript of record and the brief for appellant were then filed.

2. Appellee's brief in said cause will be filed on or before July 31, 1938, and the cause will be ready for hearing when the Court of Appeals convenes next October. Counsel for petitioner is informed and believes that said cause will be heard by the Second Circuit Court of Appeals in October and that the decision will be rendered promptly thereafter.

3. The principal question to be decided by the Second Circuit Court of Appeals in said cause is the validity of Withrow and Close Patent No. 1,732,708, which is the same patent and the same question involved in the proceedings before United States Circuit Court of Appeals for the Sixth Circuit, which proceedings the accompanying petition for certiorari seeks to have reviewed by this court.

4. The question of infringement involved in said cause in the Second Circuit Court of Appeals is substantially the same question of infringement which was involved in the above entitled causes, which question was decided in favor of the petitioner by the District Court and was not disturbed by the decision of the Sixth Circuit Court of Appeals.

5. Petitioner will inform this court of the decision of the Second Circuit Court of Appeals as soon as the same is rendered.

6. Should the decision of the Second Circuit Court of Appeals in said cause hold the said patent valid, petitioner will ask leave to amend its petition for certiorari to allege such fact.

WILBER OWEN,
Attorney for Petitioner.

I hereby certify that the foregoing motion is, in my opinion, well founded and is not made for purposes of delay.

WILBER OWEN,
Attorney for Petitioner.